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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-351

JEROME V. CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in refusing to sever counts, in admitting evidence of other offenses, and in giving or refusing to give various instructions. He also claims that certain closing remarks of the prosecutor were improper and that the evidence was insufficient to support his conviction.

An indictment returned in the United States District Court for the Northern District of Illinois

charged petitioner, a police captain, with two counts of extortion, in violation of 18 U.S.C. 1951 (the Hobbs Act). Count one alleged that in January 1969 petitioner extorted $750 from a Chicago tavern owner (Sannasardo) by fear of economic harm and under color of official right. Count two charged that from January 1969 to July 1971 petitioner extorted quantities of liquor from another tavern owner (Medow) under color of official right. The jury found petitioner guilty on count two and not guilty on count one. The court sentenced petitioner to 90 days' imprisonment to be followed by 2¾ years' probation. The court of appeals affirmed (Pet. App. 1-10).

The evidence relating to count two showed that in June 1967 petitioner told Robert Medow, the owner of a tavern and liquor store, that he had seen his trucks delivering whiskey to other taverns. Petitioner asked Medow if he was aware that this practice was unlawful. When Medow replied that he was, petitioner stated that he had encountered a similar violation previously while assigned to another police district and had made an "arrangement" with the liquor store owner. Petitioner then told Medow that he "could use a case of whiskey," whereupon Medow gave him one (Tr. 335-337). As Medow explained at trial: "I felt threatened by the captain because I was doing something I knew was slightly irregular, and that was the only reason I know, or could think of why he would bring it up" (Tr. 338).

Following the 1967 meeting, petitioner went to Medow's store at least every two months to inform

him that he was out of whiskey and could use another case (Tr. 239). On each visit during the period alleged in the indictment, Medow or his assistant gave petitioner a case of whiskey worth approximately $60 (Tr. 234, 239), for which petitioner never paid or offered to pay (Tr. 240-241). Medow testified that he never considered the cases of whiskey to be gifts, but rather felt threatened and blackmailed because petitioner knew he was breaking the law (Tr. 259-260). Medow stated that he would not have given petitioner the liquor had petitioner not been a police captain (Tr. 260).

1. The district court's denial of petitioner's motion to sever the two counts was proper. As the court of appeals stated (Pet. App. 5), when evidence on one count would be admissible with respect to the other as a similar offense, denial of severance is proper. *Drew v. United States*, 331 F.2d 85, 90 (C.A.D.C.); *United States* v. *Williamson*, 482 F.2d 508, 511 (C.A. 5). The government's proof on count one (of which petitioner was acquitted) was that in January 1969 petitioner had obtained $750 from the owner of another tavern located in the same police district by impliedly threatening to cause revocation of the owner's liquor license.* Thus, although the victims and the property

* Specifically, the alleged extortion arose from a fight occurring in a tavern owned by Summerville. When the customer who was hurt complained to the police, the investigating officer intimated to Summerville that he was in danger of losing his liquor license and told him he would have to come to the police station. There he met petitioner, who demanded $1500 to dispose of the matter. After negotiations, Summerville agreed to pay petitioner $750 (Pet. App. 1-2).

received by petitioner differed in the two alleged transactions, the court of appeals correctly ruled that "[t]he general character of each case was the same" (Pet. App. 4) and that evidence of each transaction was relevant to petitioner's intent in carrying out the other (Pet. App. 5).

Petitioner claims that the failure to sever the counts prevented his testifying in his own defense on count two (Pet. 11). But petitioner is inaccurate in stating that he "made the good faith assertion of his wish to testify on only one of the two counts" (Pet. 13). Petitioner's pretrial motion for a severance did not assert that he in fact wished to testify on one count but not the other;[2] nor did he indicate to the court at any time during the trial his desire to testify selectively.

More fundamentally, a defendant's assertion that he may wish to testify on one count but not others is insufficient to require severance; there must be "a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other." *Baker* v. *United States*, 401 F.2d 958, 977 (C.A.D.C.); *United*

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[2] The motion (Orig. Rec. 12) alleged various reasons why the joinder could prejudice petitioner but did not mention his desire to testify selectively. The supporting memorandum of law argued, among other reasons for severance, that "the Defendant *could* be forced to put in antagonistic defenses *such as* confess and deny on one count, admitting certain allegations but denying criminal intent, and not wish to testify at all on the other count or wish to put in an entirely different defense" (Orig. Rec. 17; emphasis added).

States v. *Williamson*, *supra*, 482 F.2d at 512. Petitioner made no such showing either before or during trial.[2]

Petitioner's claim that prejudice was "inherent in the jury's hearing evidence of two distinct offenses at a single trial" (Pet. 12) is likewise insubstantial. Precisely because the two transactions were distinct in their particulars and the evidence of each was uncomplicated, the jury could be expected to "keep separate what was relevant to each." *United States* v. *Adams*, 434 F.2d 756, 758 (C.A. 2). Moreover, the judge instructed the jury to consider separately the evidence supporting each count (Tr. 499-500); and the jury demonstrated that it could follow this instruction by acquitting petitioner on count one.

2. Petitioner contends that the court erred in permitting Medow to testify regarding his original 1967 conversation with petitioner and his gifts of liquor to him prior to the earliest date in the indictment, January 1969. But evidence of prior offenses is admissible "when so blended with the charged crime

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[2] *Cross* v. *United States*, 335 F.2d 987 (C.A.D.C.), cited by petitioner (Pet. 14), does not conflict with the instant case. Even if petitioner had made clear his desire to testify on only one count, the District of Columbia Circuit itself has rejected a contention that under *Cross* "a timely and bona fide election by the accused to testify as to some counts and not as to others" is sufficient alone to require a severance of counts. *Baker* v. *United States*, *supra*, 401 F.2d at 976-977. Such a rule, the court stated, "would divest the court of all control over the matter of severance and entrust it to the defendant" (*id.* at 976). See also *Bradley* v. *United States*, 433 F.2d 1113, 1122-1124 (C.A.D.C.).

that proof of one incidentally involves the other or explains [its] particular circumstances * * *." *United States* v. *Caldarazzo*, 444 F.2d 1046, 1049 (C.A. 7); *United States* v. *Malasanos*, 472 F.2d 642, 644 (C.A. 7). Here the evidence of petitioner's prior contacts with Medow was clearly relevant to show his intent in continuing to receive liquor, as well as Medow's state of mind in continuing to supply it, during the period charged in the indictment. As the court of appeals concluded, "[t]he transaction was continuing" (Pet. App. 8), and "the 1967 original conversation between Medow and [petitioner] was indispensable to an understanding of the subsequent actions by the parties" (Pet. App. 7). Since the acts charged arose from and were explained by the prior contacts between Medow and petitioner, evidence of the latter was probative and therefore admissible.

Nor is it significant, as petitioner suggests (Pet. 18-23), that the government's bill of particulars did not mention the pre-1969 contacts between Medow and himself or that a prosecution based solely on some of those acts would have been barred by the statute of limitations. A bill of particulars is designed to prevent surprise and to enable the accused to prepare his defense. See Wright, *Federal Practice and Procedure* Criminal § 129, p. 283 (1969). Here, as the court of appeals concluded (Pet. App. 8, n. 1):

> [Petitioner] was adequately apprised of the offense with which he was charged. A bill of particulars is not to be used as a discovery device. [Petitioner] knew Medow would testify and it was not necessary that the bill of particulars

recite what his testimony would be in every detail.[4]

Evidence of the pre-1969 acts was also admissible without regard to the statute of limitations. Petitioner was not charged with the commission of those acts. Rather, they were admitted as evidence of the acts for which he was tried; as such they were subject only to the normal requirement that they not be "so remote as to be without probative value" (Pet. App. 8). Having occurred no more than 19 months prior to the acts charged, they clearly were probative.

3. Petitioner's contention (Pet. 14-17) that the evidence was insufficient to support his conviction of extortion but showed only a series of "gratuitous gifts" by Medow to "retain petitioner as a friend" is insubstantial. Viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), the evidence clearly supported the jury's conclusion that petitioner had used his official position to induce Medow to supply him with liquor. Indeed, while the government was not obliged to show that

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[4] The court of appeals correctly distinguished *United States* v. *Neff*, 212 F.2d 297 (C.A. 3), relied on by petitioner. In *Neff*, a perjury prosecution, the government called a witness who was not identified until trial to testify concerning acts by the defendant occurring before the dates listed in the bill of particulars. Based upon those acts, the jury was permitted to convict the defendant of perjury "even if it disbelieved the evidence" with respect to the acts listed in the bill of particulars (Pet. App. 8, n. 1). In the instant case, the prior contacts between Medow and petitioner explained, but could not supplant as proof of guilt, the acts charged in the indictment.

Medow had acted out of fear, Medow testified that he "felt threatened" by petitioner and that he could think of no other reason for petitioner's requests for liquor than his knowledge of Medow's "slightly irregular" business conduct (Tr. 338).

4. Petitioner contends (Pet. 26-41) that the district court improperly refused to give several instructions incorporating his theory of defense and an accomplice instruction relating to Medow's testimony. He also claims that two of the court's instructions were erroneous. The court's instructions, however, were comprehensive (covering some 30 transcript pages) and accurately reflected both the facts and the applicable law of the case.

(a) Petitioner's tendered instructions relating to the definition of extortion (Pet. 28, n. 27) incorrectly stated the law and were properly rejected by the court. Count two charged him with extortion under color of official right. That offense focuses upon the wrongful use of public office to obtain property; it does not require proof of force or fear of economic loss by the victim. *United States* v. *Braasch*, 505 F.2d 139, 151 (C.A. 7), certiorari denied, 421 U.S. 910; *United States* v. *Crowley*, 504 F.2d 992, 994-995 (C.A. 7); *United States* v. *Kenny*, 462 F.2d 1205, 1229 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States*, 409 U.S. 914; see also *United States* v. *Nardello*, 393 U.S. 286, 289. Thus, petitioner was not entitled to an instruction that made extortion depend on fear of economic loss.

Petitioner's proposed instruction to the effect that extortion and bribery are mutually exclusive offenses, and that if the jury found that he had committed bribery it had to acquit him of extortion, was similarly defective. The two offenses are not mutually exclusive. See, *e.g.*, *United States* v. *Kahn*, 472 F.2d 272, 278 (C.A. 2), certiorari denied, 411 U.S. 982. Accordingly, if the jury found that petitioner had wrongfully used his office to obtain property, it was inconsequential that his conduct may also have constituted bribery. *United States* v. *Braasch*, *supra*. The court's instruction, emphasizing that the defendant's wrongful use of his official position is the essence of extortion under color of right (Tr. 503, 508-509), correctly focused on the crime with which petitioner was charged.

(b) Petitioner was not entitled to an accomplice instruction relating to Medow's testimony.[5] An accomplice is one who could have been charged with the same offense as the person he testifies against, either as a principal or as an accessory. *Government of Virgin Islands* v. *Torres*, 476 F.2d 486, 490 (C.A. 3). Medow was not a public official nor did he induce or aid in inducing anyone to relinquish property.

In any event, the purpose of an accomplice instruction is to alert the jury to a special motive—the

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[5] The decision whether to give an accomplice instruction "is not a matter requiring constitutional scrutiny but "merely a part of the general conduct of the trial, over which the judge's powers are discretionary * * *." *United States* v. *Nolte*, 440 F.2d 1124, 1126 (C.A. 5).

avoidance of prosecution—that a witness may have had for testifying. Medow had been granted immunity from prosecution before trial, and the court instructed the jury that "the testimony of a person granted immunity should be examined and weighed by you with greater care than the testimony of an ordinary witness" (Tr. 509-510). Thus, the court gave substantially the instruction that petitioner requested.

(c) Petitioner claims (Pet. 32-35) that the court's immunity instruction was itself defective because the court went on to remind the jury that an immunized witness is not protected against a perjury charge if he testifies falsely, but did not add that "such sanction in fact was * * * available against *any* witness, immunized or not, who might give false testimony" (Pet. 34). However, the court had apprised the jury of precisely this fact at the start of trial (Tr. 33-34). Moreover, the immunity instruction was given as a protection to petitioner, and was merely balanced by the reminder that a witness's immunity does not extend to perjury. Since only the immunized witnesses (Medow and Sannasardo) had an arguable motive to testify falsely against petitioner, there was no need to instruct the jury on the possible consequences of perjury by other witnesses.*

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* Petitioner's claim (Pet. 34) that the instruction (Tr. 510) requiring the jury to weigh the testimony of an immunized witness "with greater care" than that of an ordinary witness might have been interpreted to mean that such testimony "should be given more weight" than that of an ordinary witness, is answered by the fact that he requested the very same instruction in regard to the testimony of informers (Defendant's Instruction T, Orig. Rec. 52).

(d) Petitioner further contends (Pet. 38-41) that the district court erred in instructing the jury, prior to any request, that it would not answer questions concerning "what the evidence was on a particular subject" (Tr. 517). The judge simultaneously told the jury that he might "find it appropriate to clarify [any doubts as to what the law is] since [that] is my responsibility" (*ibid.*).

Petitioner did not object to this instruction (Tr. 519) and must therefore show plain error under Fed. R. Crim. P. 52(b). That rule is invoked only where "it appears to be necessary in order to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process." *United States* v. *Baxter*, 492 F.2d 150, 170 (C.A. 9), certiorari denied, 416 U.S. 940; *United States* v. *Grasso*, 437 F.2d 317, 320 (C.A. 3), certiorari denied, 403 U.S. 920. No such necessity exists here.

The judge's instruction was intended to emphasize that the jury was the sole finder of fact and that it was expected to rely on its collective recollection of the evidence. His statement that "[w]e don't respond to questions" (Tr. 517) regarding the evidence was not, as petitioner suggests, a failure wholly to exercise the trial judge's discretion whether to answer an inquiry concerning the evidence, but must be viewed in the context of a trial in which presentation of the evidence took only two days and in which, as the court of appeals noted (Pet. App. 4-5), the facts were uncomplicated. In this setting, the trial judge reasonably concluded that a fair and impartial verdict would best be assured if the jury relied upon its own recol-

lection of the evidence rather than asking questions that might cause the judge to "highlight [particular] evidence out of proportion with the other evidence" (Tr. 517).

5. Finally, petitioner contends (Pet. 23-26) that certain remarks by the prosecutor in closing argument were improper. He refers first to the prosecutor's references to his pre-1969 contacts with Medow. Since the court had expressly ruled this evidence admissible (Tr. 335-336), there clearly was no impropriety in the prosecutor's referring to it in summation. Second, petitioner cites a statement by the prosecutor that "Mr. Lynch [counsel for petitioner] has argued the crime was bribery" (Tr. 481). Although petitioner had submitted instructions that would have allowed the jury to acquit him based upon a finding that he had committed bribery rather than extortion (Pet. 28-29, n. 27), he now complains of the prosecutor's "inexplicable reference to a totally different and uncharged crime" (Pet. 25).

But the prosecutor's remark was invited by defense counsel. In cross-examining Medow and Sannasardo, petitioner's attorney repeatedly sought to elicit that, while they had made "gifts" to petitioner, he had never threatened or "extorted" them (Tr. 167-168, 175-176, 352-354, 356). Counsel continued this theme in closing argument, ridiculing Sannasardo's testimony as purporting to show, at most, that Sannasardo had attempted to bribe a policeman other than petitioner (Tr. 464), and emphasizing, for example, that Medow had never confided to a trusted

employee that he was being "extorted or blackmailed" (Tr. 478). Defense counsel concluded by likening his case to countless gifts of a bottle or case of liquor made by businessmen to public officials "as a showing of good faith," conduct that would put "every public official" in jail if it amounted to "extortion" (Tr. 479). In short, the defense was clearly willing to let the jury infer that petitioner had been a party to petty and commonplace acts of bribery, but not extortion. The prosecutor's remark merely alluded to that tactic.

Even if the remark was improper, however, it was a passing one that the prosecutor did not repeat. The court had previously cautioned the jury that closing arguments are not evidence (Tr. 448), and in its charge the court emphasized that the jury was to decide the case on the evidence and applicable law (Tr. 485-486, 495). In these circumstances, we submit, the prosecutor's remark was not so prejudicial as to deprive petitioner of a fair trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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